

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)
	)
NATIONAL TELEVISION COMPANY	)
	)
Licensee of Multipoint Distribution Service	)
Station WHT664, Atlanta, Georgia	)
	)
Request for Waiver of Section 21.303(d) of	)
the Commission's Rules	)

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 22, 2003**

**Released: September 24, 2003**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. In this *Memorandum Opinion and Order*, we address National Television Company's (NTC's) two requests for waivers,<sup>1</sup> pursuant to Section 21.303(d)(3) of the Commission's Rules, seeking six-month extensions in the time allowed for NTC to resume operation of Multipoint Distribution Service (MDS) Station WHT664, Atlanta, Georgia. The station's operation was discontinued on February 28, 2001.<sup>2</sup> For the reasons stated herein, we find that grants of NTC's waiver requests are warranted under the circumstances presented and would further the public interest.

2. *Background.* On October 24, 1988, NTC certified that it had completed construction of Station WHT644.<sup>3</sup> According to NTC, since the station's construction until February 28, 2001, NTC leased transmission capacity on the station to BellSouth Corporation (BellSouth) for use in the wireless cable business market serving the Atlanta, Georgia area. Due to the expiration of the lease that NTC held with BellSouth,<sup>4</sup> on February 28, 2001, NTC discontinued operational use of Station WHT664. The following month, on March 30, 2001,

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<sup>1</sup> Waiver Request Pursuant to Section 21.303(d)(3) (filed Mar. 29, 2002) (First Waiver Request); Waiver Request Pursuant to Section 21.303(d)(3) (filed Aug. 29, 2002) (Second Waiver Request).

<sup>2</sup> See First Waiver Request at 1.

<sup>3</sup> National Television Company Certification of Completion of Construction, FCC Form 494A (filed Oct. 24, 1988).

<sup>4</sup> First Waiver Request at 1-2. See also National Television Company Annual Report for Calendar Year 2001 (filed Feb. 22, 2002).

NTC filed a notification of temporary discontinuance of service with the Commission, as required by the Commission's Rules.<sup>5</sup>

3. For approximately a year beyond the expiration of its lease with Bell South, NTC continued lease negotiations with Bell South.<sup>6</sup> Although these negotiations ultimately proved to be unsuccessful,<sup>7</sup> NTC nevertheless continued to pursue the development of other business plans for providing mobile services in the Atlanta metropolitan area.<sup>8</sup> NTC indicates that due to a lack of available equipment and other difficulties associated with engineering such a system, it was not possible to provide such services within the time frame specified in Section 21.303 of the Commission's Rules.<sup>9</sup> Consequently, NTC decided to operate the station under its currently authorized parameters until implementation of a more progressive business plan became possible.<sup>10</sup>

4. On March 29, 2002, NTC submitted a timely request for a rule waiver, pursuant to Section 21.303(d)(3) of the Commission's Rules.<sup>11</sup> Section 21.303(d) allows a licensee who has discontinued station operation the option of resuming the same operation within six months from the initial period of nonuse, with a waiver.<sup>12</sup> With this initial period of nonuse set to expire shortly, in the March 29, 2002 request, NTC sought an extension of time -- an additional six months -- within which to resume operation of the station.<sup>13</sup> Five months later, on August 29, 2002, with its first request still pending, NTC submitted a second timely request for a rule waiver, also pursuant to Section 21.303(d)(3), seeking yet an additional six months within which to resume operations.<sup>14</sup> Ultimately, NTC resumed station operation somewhat less than four months after its August 29, 2002 waiver request, on or about December 13, 2002.<sup>15</sup>

5. *Discussion.* The express language of Section 21.303(d) of the Commission's Rules requires the licensee to take one of three actions "if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed. . . ."<sup>16</sup> The three potential actions are (1) submitting its station license

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<sup>5</sup> Notification of Temporary Discontinuance of Service (filed Mar. 30, 2001). Section 21.303(c) requires that such notification be given within seven days of the discontinuance, which in this case would have been March 7, 2001.

<sup>6</sup> First Waiver Request at 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> Second Waiver Request at 2.

<sup>11</sup> 47 C.F.R. § 21.303(d).

<sup>12</sup> See ¶5, *infra*.

<sup>13</sup> First Waiver Request. The request, as written, would have the Commission allow NTC until September 30, 2002 to resume operations.

<sup>14</sup> Second Waiver Request. The request, as written, would have the Commission allow NTC until March 30, 2003 to resume operations.

<sup>15</sup> Resumption of Service Notification (filed Dec. 17, 2002). See also Verification of Pending Waiver Request (filed Dec. 17, 2002); National Television Company Annual Report for Calendar Year 2002 (filed Feb. 24, 2003).

<sup>16</sup> *Id.*

for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver and an extension in the time permitted for resuming operation, pursuant to Section 21.303(d)(3).<sup>17</sup> Significantly, prior to the adoption of Section 21.303(d), the Commission's Rules did not require licensees to relinquish unused frequencies.<sup>18</sup> The Commission found that, "[i]n addition to preventing others from using the spectrum, this results in the Commission being unable to discern when spectrum is not being used or is being underutilized."<sup>19</sup> As a result, the Commission adopted Section 21.303(d) to promote efficient use of the MDS spectrum.<sup>20</sup>

6. In the instant case, NTC chose the third alternative under Section 21.303(d) by requesting rule waivers for additional time in which to resume operations. Pursuant to Section 21.19 of the Commission's Rules,<sup>21</sup> an applicant seeking a waiver must make an affirmative showing that: (a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.<sup>22</sup> Based upon the record before us, we conclude that NTC has made a sufficient showing with respect to both waiver requests. As the requests seek waivers of the same rule and involve overlapping facts and circumstances concerning the same station, we below analyze the two requests in tandem.

7. With respect to the first prong of the waiver standard, both waiver requests demonstrate that the underlying purpose of Section 21.303(d) will not be served by its application to the circumstances presented, and that grant of the waiver is otherwise in the public interest. Consistent with the Commission's goal, reflected in its adoption of Section 21.303(d), to promote the full and efficient utilization of spectrum,<sup>23</sup> the record shows that NTC has acted diligently to reactivate the station and thereby achieve a goal consistent with the purpose of Section 21.303(d). Moreover, we see nothing in the record before us indicating that NTC has sought to warehouse spectrum or otherwise conduct itself in a manner contrary to Section 21.303(d)'s underlying purpose. The First Waiver Request indicates that NTC not only held spectrum leasing discussions with BellSouth, but when those discussions failed to reach a successful conclusion, NTC further pursued other business opportunities (e.g. potential leasing arrangements with other parties).<sup>24</sup> The Second Waiver Request also details reasonable diligence on the part of NTC in its attempts to: reactivate the station by its entering into negotiations for a transmit site; obtain the necessary transmitting equipment to return Station WHT664 to operational status; and obtain the insurance needed to commence installation.<sup>25</sup> Thus, we believe that both waiver requests

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<sup>17</sup> See 47 C.F.R. § 21.303(d)(1)-(3).

<sup>18</sup> See Revision of Part 21 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 82 (1987) (*Part 21 R&O*).

<sup>19</sup> *Id.*

<sup>20</sup> See *id.*

<sup>21</sup> 47 C.F.R. § 21.19.

<sup>22</sup> *Id.*

<sup>23</sup> See *Part 21 R&O*, 2 FCC Rcd 5713, 5724 ¶ 82.

<sup>24</sup> First Waiver Request at 1.

<sup>25</sup> Second Waiver Request at 2.

demonstrate that NTC reasonably sought to properly and effectively utilize spectrum but was unable to do so in a timeframe consistent with that set forth in the Commission's Rules. We find it decisionally significant that NTC ultimately was able to return the station to operational status within the time it sought.<sup>26</sup> We believe that under the facts and circumstances presented, granting the rule waivers, pursuant to Section 21.303(d)(3), thereby allowing the requested additional period of inoperation, is consistent with the underlying purpose of the rule. Moreover, we believe that granting NTC's waiver requests is in the public interest because it would allow NTC the opportunity to provide important advanced services to customers in the Atlanta, Georgia geographical area.<sup>27</sup> Finally, after having examined both requests, we believe that NTC has demonstrated that no reasonable alternatives exist. Thus, we conclude that grants of both Section 21.303(d) waiver requests are warranted under the first prong of the waiver standard.<sup>28</sup>

8. Accordingly IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.106, the Waiver Requests Pursuant to Section 21.303(d)(3) filed by National Television Company on March 29, 2002, and on August 29, 2002 ARE GRANTED.

9. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§0.131, 0.331.

#### FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau

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<sup>26</sup> NTC sought until March 30, 2003 to resume operations, and returned Station WHT664 to operation in mid-December 2002. *See* Second Waiver Request, Resumption of Service Notification.

<sup>27</sup> This case is readily distinguishable from Hydra Communications, *Order on Reconsideration*, 18 FCC Rcd 4481 (WTB PSPWD 2003). In the *Hydra* case, the station in question had not operated for six years, and the licensee never requested a waiver of Section 21.303(d). *Id.*, 18 FCC Rcd at 4483 ¶¶ 5-6. In contrast, NTC kept working to return its station to operation and was ultimately successful in returning the station to service.

<sup>28</sup> As the first prong of the waiver standard has been satisfied, we need not analyze the facts and circumstances under the waiver standard's second prong.